IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO.221 OF 1996**

The State of Maharashtra ..Appellant
(Orig.complainant)

Vs.

1. Baban Parbat Bolij

2. Sou. Satyabhama Parbat Bolij
Both resident of Vinapur,Tal.Yeola,
Dist. Nashik. ..Respondents
(orig.Accused)

Mr. D.R. More, A.P.P. for the State.
Mr. Kotwal and Mr. M.S. Mohite for the respondents.

**CORAM : SMT. RANJANA P. DESAI &**
**ANOOP V.MOHTA JJ.**

**DATE : 21ST DECEMBER, 2005.**

**JUDGMENT ( PER ANOOP V. MOHTA, J.)**

. This is a State appeal against an order of acquittal dated 27/11/1995 passed by the Additional Sessions Judge, Nasik, whereby, the respodnents-accused were acquitted of the charges under section 302 r/w section 34 of Indian Penal Code and Section 498-A r/w section 34 of Indian Penal Code.

2. One Mandabai, (the deceased), a wife of accused No.1 and daughter-in-law of accused No.2, as per the prosecution, succumbed to burn injuries, caused by both

the accused by pouring kerosene on the person of the deceased and set her ablaze on 7/1/1995, at 7 a.m. in their form house at village Visapur. The deceased married with accused No.1 about 2-1/2 years before the death. One female child born out of their wedlock. Both the accused started ill-treating the deceased after one year of their marriage. They even started assaulting the deceased- Mandabai. The deceased accordingly complained Chandrabhan (P.W.3 ) about the ill-treatment. The incident of 7th January, 1995, was reported by one Suman. The sister of Chandrabhan went to village Kanadi to bring her father and uncle. The brother left for village Kanadi. Chandrabhan informed the incident to the Police-Patil . They went to the place of offence and saw Alkabai (P.W. 4) and her mother, who were sitting there. The body of the deceased was completely burnt. She was yelling for water. On inquiry, the deceased- Mandabai told that accused No.1 poured kerosene on her person and accused No.2 ignited her with matchstick. When she caught fire, accused Nos. 1 and 2 sneaked away. One Raghunath (P.W.5) brought the jeep and deceased was hospitalised in the Government Hospital, Yeola, at about 4 p.m. Head Constable More of Yeola Police Station (P.W.12) came to

the hospital and recorded dying declaration-statement Exh.40, of the deceased, after obtaining necessary certificate of Medical Officer. The crime was registered Crime No.2/95 for the offence punishable under section 307 and 498A r/w section 34 of Indian Penal Code, after recording of the said dying declaration.On the requisition from the Head Constable More, Special Executive Magistrate (SEM) (PW.) in this case, Naib Tahasildar, recorded dying declaration after obtaining certificate from the Medical Officer (P.W. ) about the fit condition of the deceased.

3. On 8/1/1995 A.P.I. Salunke went to the spot and prepared spot panchanama Exh. 14. The statements were also recorded including of Maruti Bolij and Alkabai (PA.) Accused No.2 was arrested on the same date.Accused No.1 was arrested on 9/1/1995. The statement of one Vastalabai and two others were recorded on 9/1/1005.

4. The deceased was removed to the Civil Hospital,Nasik on 9/1/1995. The third dying declaration was recorded by Special Judicial Magistrate (SJM) (P.W.2).

5. On 10/1/1995 A.P.I. Salunke also recorded the statement of the deceased. On 10/1/1995 the deceased succumbed to injuries. The offence therefore, amended to under section 302 of Indian Penal Code. The post-mortem was performed. The inquest panchanama was also recorded. The statements of other witnesses were recorded on 12/1/1995.

6. After completing the investigation on 31st March, 1995, a charge-sheet was filed in the Court of J.M.F.C. Yeola. Both the accused pleaded not guilty and claimed to be tried. The defence of accused No.1 was of alibi. According to the defence the deceased-Mandabai caught fire because of flaring-up of the stove. The fire was extinguished by her mother-in-law i.e. accused No.2 and adjoining neighbourer by name Lahanubai.

7. The prosecution examined 13 witnesses. The defence examined three witnesses. Those details are ;

"The prosecution in order to bring home the guilt of the accused, has examined P.W.1 Mahadu at Exh.13, he is panch witness, and spot panchanama is at Exh.14, P.W.2 Maruti Biolij at Exh.15, P.W.3 Chandrabhan at Exh.16, Alkabai Bolij P.W.4 at Exh.20, Rangnath Bolij P.W. 5 at Exh.21, Bhika P.W. 6 at Exh.22, Prakash P.W.7 at

Exh.23, Vasant Gosavi, Special Executive Magistrate P.W. 8 at Exh.26, Prabhakar Baviskar, Special Judicial Magistrate P.W. 9 is examined at Exh.27, D.D. i.s at Exh.28, Dr. Lokhande, from Yeola Hospital is examined at Exh.35, as P.W. 10 Dr. Ashtaputre, from Civil Hospital is examined as P.W. 11 at Exh.37, Head Constable More is examined as P.W. 12 at Exh.38m, and statement recorded by him of Mandabai on the strength of which F.I R. came to be recorded as Crime No.2/95, is at Exh.40, A.P.I. Salunke is examined as P.W. 13 at Exh.42, C.A. report is at Exh.44, Pradip Pawar, M.O. is examined as P.W. 14, at Exh.50. The defence has produced the documents alongwith list Exh.54 and examined D.W. 1 Lahanubai at Exh.55, Bhagwan D.W. 2 at Exh.56, Uttam Ahire, D.W. 3 at Exh.59, Inquest panchanama is at Exh.9. P.M. Notes are at Exh.10, arrest panchanama is at Exh.12, advance cause of death certificate is at Exh.11. This is all about the documentary and oral evidence on which the prosecution has kept the reliance to bring home the guilt of the accused."

8. The learned Sessions Judge has acquitted the accused on all counts. Therefore, this appeal by the State. Heard the learned A.P.P. Mr. D.R. More for the State and Mr. Kotwal and Mr. M.S.Mohite for the respondents. With the assistance of the learned Counsel for the parties gone through the entire record of the matter. The learned A.P.P. has relied on the following cases, in support of his basic submission that in view of the three dying declarations, the order of acquittal is bad (Kundula Bala Subrahmanyam and Another V. State of Andhra Pradesh ( (1993) 2 Supreme Court Cases 684). The contains of these three dying declarations were

trust worthy and consistent. The dying declarations can be the sole basis for a conviction (Shanmugam Alias Kulandaivelu V. State of T.N.) (2003 S.C.C. (Cri) 1501, specially when the deceased, as certified by the medical officer and supported by the others, was in a fit state of mind to make the said statements. (Vidhya Devi and another V. State of Haryana) The dying declaration in question inspire full confidence in its truthfulness and correctness and its intrinsic worth and reliability can be determined from its tenor and contents (State of Maharashtra V. Sanjay S/o Digambarrao Rajhans) ( 2005 S.C.C. (Cri.) 231. The dying declarations in such circumstances have evidential value and in the present case, as duly proved and attested, therefore the prosecution has proved the case beyond doubt. (Ravi and another V. State of Tamil Nadu) ( (2004) 10 SCC 776), (Sohanlal Alia Sohan Singh and others V. State of Punjab) (2004 S.C.C. (Cri.) 226/). He further relied on the conduct of the accused to support his case (State of Rajasthan V. Prithivi Raj) ( 1995 Supp. (3) S.C.C. 410)

9. The learned Counsel appearing for the respondent-accused has basically relied on ( K.

Ramchandra Reddy and P.P.) (AIR 1976 S.C.1995) and contended that it would be extremely unsafe to place any reliance on the Dying Declarations in question, as prosecution witnesses and or surrounding circumstances were unsupporitve. On the contrary, the defence witness supports the pleas of alibi of the accused. He further submitted that the trial Court while passing the order of acquittal, has taken note of this lacunas and there is nothing to be interfered with. He has relied on K. Ramchandra Reddy (Supra) and contended that no case is made out to interfere with the possible view expressed by the learned Judge. He therefore, contended to maintain the order of acquittal passed by the Sessions Judge.

10. Taking into account the Supreme Courts decision as relied by both the parties, it is necessary to consider into the following factors. In the present case as contended all three dying declarations had been recorded when the deceased was in a mentally fit condition. She had capacity to understand the questions and she had answered accordingly. All the dying declarations had been made at the earliest opportunity. There is nothing on the record to prove that the said

dying declarations were the result of tutoring by interested parties. The accused failed to bring any material and or even borne out from the record, that the said dying declarations were tutored or influenced by any third person during the respective declarations recorded by the respective persons. In the present case we have noted that even though there was 100% burn the deceased succumbed to the said injuries after three days. There is nothing borne out from the record that she was unconsciouses and/or was not in a fit state of mind or the statements were involuntarily made.

11. All the three dying declarations have been recorded by the competent persons and a deceased was in her mentally fitness, signed and same were endorsed by the Medical Officers. There is nothing to suggest that she was taking any time to answer the questions and or was suffering with pains, which unable her to give such statements on all these three occasions.

12. However, the various timings of recording of these three dying declarations and its contents have been resorted to attack the dying declarations.

13. An important aspect which need to be considered is the consistency or inconsistency in the three dying declarations and supporting surrounding circumstances. There is no eye witnesses to the incident. It is a case of circumstantial evidence and the uncontroverted testimony of the deceased. The first dying declaration was recorded Exh.38 dated 7/1/1995 by the head constable P.W.12. It was recorded at about 4.35 p.m. Exh.40. In the first dying declaration the deceased had implicated accused 1 and 2 by stating that on 7/1/1995 at about 7 a.m. while she was in the house, accused 1 and 2 abused her again and both of them poured kerosene from the can and accused 2 ignited the fire. She therefore, sustained burn injury. She raised hue and cry. People gathered and they extinguished the fire. Thereafter her father-in-law, Bhika and brother-in-law, Raghunath took her to Yeola Government Hospital. She had also made reference to the earlier dates abuses and assaults by the accused. There was no such mention, when the dying declaration was recorded by SJM. Exh.26 at 4.25 p.m. In Exh.25 before the SJM. the statement was missing to the extent of gathering of people, after her hue and cry and taking her to the hospital by the relatives, as referred in Exh.40 (Second dying declaration) recorded

by P.W.12 Police Constable. The reason for killing her was to have second marriage of the accused 1. In the dying declaration Exh.40 which was recorded at 4.50 there was no reference about her daughter of 12 months. The reference of her daughter was in Exh.26. In both these dying declarations, there is consistency in reference to the role played by both the accused and their presence at the relevant time on 7/1/1995 at about 7 a.m. In the dying declaration recorded by SJM Exh.28 which was also in question and answer form. There was reference that accused 2 had extinguished the fire which was missing in other two dying declarations. There is also no reference in 3rd dying declaration about gathering of other relatives and or hue and cry made by the deceased. The deceased made statement that the police of Yeola had recorded her statement.

14. What requirement now is to see the surrounding circumstances to support the dying declaration. So far as spot panchanama is concerned, as observed by the learned Sessions Judge, stove was found at the place of office . The pieces of burn match stick and kerosene containers were seized by the police. The ground floor of the house was also smelling of kerosene. The post

mortem report Exh.10 also supports that the deceased died because of 100% burn injuries. therefore, there is no dispute that the death was unnatural.

15. Both the accused in their statement under section 313 of Cr.P.C. pleaded alibi and denied the whole incident and their respective role as charged by the prosecution and expressed their ignorance about the incident in support of their defence. The learned Sessions Judge accepted the defence of the accused and particularly the plea of alibi. The learned Sessions Judge has also discarded the three dying declarations made by the deceased by holding it to be inconsistent. Therefore, the learned counsel appearing for the accused submitted that apart from three dying declaration even on merit the reason given by the learned Judge is reasonable and view taken is correct. The defence witness who support the accused need to be treated equally with the prosecution witnesses and therefore, this unshattered evidence of defence witnesses in the facts and circumstances of the case need to be accepted and therefore, the acquittal order passed by the learned Sessions Judge need no interference.

16. The conviction in such matters, based on the dying declarations definitely need further supports from the surrounding circumstances. In the present case, the plea of alibi, apart from the defence witnesses, played dominant role.

17. The deceased in her dying declaration stated that his father-in-law was on tractor of onion and he was not present on the spot at the relevant time. There is no direct evidence to connect that the accused No.1 and 2 were present on the spot at the relevant time. All the dying declarations however referred their presence. Accused No.1 in his statement under Section 313 of Cr.P.C. also invoked plea of alibi stating thereby that he was with his father on 6/1/1990 i.e. day before the incident with his father at Manmad for selling onion, He was arrested on 7/9/1995 at 6 p.m. at Manmad. The learned Judge based on exh. 24 and necessary documents from the market yard gave a finding that the father of accused No.1 was at Manmad at the relevant time. But both these documents did not mention the name of accused 1. This fact has been supported by the defence witness i.e. Lahanubai D.W.1. Bhagwan Bolij, tractor owner, Uttam Ahire. D.W. 1 Lahanubai in

support of the defence and as observed by the Sessions Judge that accused No.1 with his father went to Manmad along with the tractor at 5 to 6 p.m.The incident took place, as per the dying declaration on 7/1/1995 at 7 a.m. in the morning.

18. The first dying declaration itself was recorded at about 4.25 p.m. and last at about 10.45 p.m.. The prosecution failed to lead evidence of any neighbour in support of their case to justify and prove the presence of both the accused at the relevant time on the spot. The only independent witness a neighbour Lahanubai was examined by the defence, D.W.1. The other uncredible and untrustworthy witnesses examined by the prosecution were only relatives and the interested witnesses.

19. In absence of direct evidence and material, while considering the case of the prosecution and of the defence, we cannot overlook the statistics about the increasing crime against the women. It means more caution and careful approach of the rival contentions of both the parties. The three dying declarations in the present case referred, 7 a.m., the time of the offence of the incident. The defence witness D.W.1 referred the

time of incident at about afternoon. The first dying declaration recorded at 16.25 hours, second dying declaration was recorded at (22.45 hours) 16-50 hours and last dying declaration was recorded at 10.45 p.m. at night. There is nothing to support and or any justification brought on the record by the prosecution, to the events between 7 a.m,. to 16.25 hours. When as stated by defence accused 1 extinguished the fire by wet "dhotar" and same has been supported also by the defence witness D.W.1. Accused 2 left the spot to call accused 1 and her husband. The parents of the deceased came in the picture thereafter. They were with the deceased through out. In the dying declaration there is reference that S.J.M. had asked the parents to go out before recording the dying declaration. This factor cannot be overlooked. In the facts and circumstances of the case while considering the submission of the learned Counsel appearing for the defence about the constant influence of the parents of the deceased before recording all these three dying declarations cannot be neglected.

20. As observed by the learned Judge it requires 1-1/2 hours from Manmad to Visapur. There is nothing

except the dying declarations recorded, which supports the prosecution case that the incident took place at 7 a.m. and accused 1 and 2 were present at the relevant time. The witness, Lahanubai, supported the defence to the extent that the accused 1 and 2 and father- in- law of Mandabai, had loaded the tractor with onion to transport to Manmad on the earlier date of the incident. She further stated that accused 1 and his father went along with the tractor at about 5 to 6 p.m. and they did not return on that day. As per her evidence, Mandabai took water from her well and talked with her daughter at about 10.30 a.m. .She saw accused 2 proceeded to her field late in the afternoon. Before that they sat on the otta for chit-chating for some time. Pramila the sister of accused 1 also returned from the school and joined them. At that time they heard noise from the house of accused 2 and they rushed towards the house from where smoke was emitting. This witness further stated that accused 2 tried to extinguish the fire, as suggested by her, pouring water on the person of the deceased. When enquired, the deceased told that as stove flared up, she caught fire. As suggested, accused No.2 went to Manmad to bring her husband and son so as to shift Mandabai to hospital and

accordingly Satyabhama, accused 2 left for Manmad. She further stated that Raghunath and Alkabai came to the house and after some time the parents of the deceased reached. There is nothing in the cross-examination which has shattered the evidence of this witness. The deceased in fact in one dying declaration also stated that accused 2 had extinguished the fire. This defence witness has also stated that accused 2 extinguished the fire with wet "Dhotar". This witness therefore, supports the defence that the accused 1 and accused 2 were not present at the relevant time on the spot.

21. D.W.2 in his evidence has supported the defence that the accused, his father and driver were in the tractor when they were proceeding to Manmad Market at about 3 to 4 p.m. on 6/9/1995. The tractor of the accused came in the Manmad Market. The tractor was from Village Bhadne. The tractor of the accused was in the row in the market. The tractor of the accused and this witness were far away but near the shop of Sanjusheth, where they stayed through out the night. This witness stated positively that the accused and his father were also with him, when he received phone message that the girl caught fire in the house of Baban and Parvat. The

message was accordingly conveyed to accused 1 and parvat. Parvat thereafter went by hiring vehicle and Baban stayed there. Police after two hours arrested accused 1. This evidence also remained unshattered, except that he was unable to justify the name of person who phoned them and further that he did not disclose to anybody that accused 1 and his father were at Manmad. This according to us nowhere disturb the defence case.

22. D.W. 3 Uttam who is a owner of tractor, further supports that accused 1 and 2 and father of accused 1 loaded onion in the trolley of his tractor.Accused 1 and his father reached at about 2.30 p.,. at Market yard and it was parked for the auction at about 4 p.m. The auction took place at about 4.30 p.m. on 6/9/1995. He further stated that when he reached back to Manmad on 7/9/1995 at about 7.30 a.m. Accused 1 and his father and owner of the tractor from Visapur were present there. They waited for their turn. They further stated that the tractor owner received phone and informed Parvat that the girl was ablazed and thereafter Parvat left for the village. This witness also supports the defence plea of alibi. In the cross-examination he has expressed his inability to say whereabouts of Baban in

the evening of 6/1/1995 to 7/1/1995 upto 7 a.m. As noted, D.W. 2 has made positive statement that they were together with accused and his father through out the night on 6/11/ 1995.

23. In this background we have to consider the three dying declaration given by the deceased, Except the statement in the dying declarations about the presence of accused 1 and 2 there is nothing to suggest and support the prosecution case. The presence and actual role played by accused 1 and 2 as stated by the deceased appears to be doubtful in view of proved plea of alibi . Accused No.1 and 2 have been implicated by the deceased in this dying declarations. The statements of the deceased, not fully supported by the prosecution, to justify their case of presence of accused 1 and 2 on the spot at the relevant time. It is difficult to convict the accused on the basis of such unsupported dying declaration. Assuming for a moment that there is a statement about the harassment by these accused, but there is no sufficient evidence to support same.

24. For want of support from the prosecution that accused 1 and 2 were physically present at the relevant

time and or committed the offence, has weaken the effect of these three dying declarations, specifically in the present fact and circumstances of the case. The learned Judge has recorded the acquittal of the accused based on the plea of alibi of both the accused. As noted there are 3 defence witness who supported the defence of plea of alibi. These three witnesses remained un shattered and therefore, in such circumstances, as the learned Judge has after considering the material on the record including prosecution witness, acquitted the accused, not only on the ground of plea of alibi, but it is also on the ground of unsupportive material to justify the conviction based on such dying declarations. We have also gone through the dying declarations. We have noted that the dying declaration as recorded need further supports from the prosecution, and the material on the record, which is lacking in the present case. The defence witness however, has supported the case of the accused.

25. The learned Judge, has considered the evidence of prosecution witnesses in detail in the judgment, basically para 8 to 12. After scanning the evidence of all the witnesses also we are of the view and knowing

limitation to interfere with the reasoned order of acquittal passed by the Sessions Judge, as elaborated by the Supreme Court in various cases and as relied by the learned Counsel appearing for the respondents in K. Ramchandra Reddy and others, (Supra) and (Narendra Singh V. State of M.P.) (AIR 2004 SC 3249) we decline to disturb the findings of acquittal.

26. Even assuming for a moment that the other view in the facts and circumstances of the case could be possible but in the instant case, the defence witness read with the unsupportive material to the three dying declarations, we are satisfied that only on the basis of these 3 dying declarations, even they recorded in accordance with law, no way sufficient to shatter the evidence of the defence. We are of the view that it is unsafe to convict the accused by reversing the order of acquittal in the facts and circumstances of the case.

27. All the cases cited by the public prosecutor on the principle of dying declaration and its evendential value need no discussion as the factual aspect of the present matter has substantially proved the plea of alibi and that itself distinct the cases cited from the

present one. The Apex Court in (Narendrasingh) (Supra) held that burden of proof of alibi is always on the accused. In the present case there is a material produced on the record to support the plea of alibi and proved the same also.

28. It is true that it is difficult for the third person to read and assess the reason for such implication of accused 1 and 2 by the deceased. As per the defence, they were not present on the spot at the relevant time. It is also very difficult to overlook the three dying declarations in question. But there are missing links and for want of supporting evidence to connect the statement made by the deceased in the three dying declarations about the involvement of the accused 1 and 2 at the relevant time, has weaken the dying declaration, specially when in the present case, the defence witness, remained un shattered, and supported the plea of alibi of the accused. In this background, if the accused were not on the spot, at the relevant time, and the Prosecution failed to prove the same by supporting the evidence and surrounding circumstances, The accused cannot be held guilty of the offence. No conviction can be based solely on the basis of

inconsistent dying declarations more so when there is no supporting evidence. Taking all this into account the reasoned order of acquittal need no interference.

29. Therefore, after considering carefully the reasoning given by the Sessions Judge, we find no perversity in the judgment of the Sessions Judge warranting interference, in the order of acquittal. Accordingly the appeal is dismissed.

**(SMT. RANJANA P.DESAI, J)**

**[ANOOP V. MOHTA, J.]**